

Academic Freedom and the Law

I. Introduction and Overview

II. Brief History of Academic Freedom

A. Origins in German Universities¹

The legal concept of academic freedom originated in Germany around 1850. . . . The Prussian Constitution of 1850 declared that "science and its teaching shall be free." In Germany, academic freedom is known as *Lehrfreiheit* – the right of faculty to teach on any subject. There are two related concepts in Germany: (1) *Freiheit der Wissenschaft*, freedom of scientific research, and (2) *Lernfreiheit*, the right of students to attend any lectures, and the absence of class roll calls. This kind of academic freedom has never been a major issue in the USA. . . .

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The German constitution of 23 May 1949, Art. 7 explicitly declares that education and all teaching is under the control of the Federal Education Minister [and states, at Art. 5, cl. 3] . . . that "Art and science, research and teaching are free."

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Americans during the 1800's who desired a doctoral degree typically went to Europe and studied at a university in England, France, or Germany. In 1876, Johns Hopkins University in Baltimore was founded along the design of German universities at Göttingen and Berlin, which emphasized scholarly research by professors. Other universities in the USA were soon founded along the same lines: for example, the University of Chicago in 1890 and the California Institute of Technology in 1891.

During this time, older American institutions of higher education (e.g., Harvard, Princeton) evolved to include the German idea of a university as a place for scholarly research, as well as teaching of undergraduates. In 1915, the newly formed American Association of University Professors issued their first report on academic freedom.

B. The American Association of University Professors ("AAUP") and the 1940 Statement of Principles on Academic Freedom and Tenure²

1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. . . . Limitations of academic

¹ R.B. Standler, "Academic Freedom in the USA" (2002), <http://www.rbs2.com/afree.htm>.

² AAUP 1940 Statement of Principles on Academic Freedom and Tenure, and 1970 Interpretive Comments, <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm>. Note that the quoted principles do not include the references to the 1970 Interpretive Comments.

freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment. . . .

3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

C. Additional Issues Identified in AAUP Statement of Principles

1. "Academic freedom . . . applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights."
 - a. The first 1970 Interpretive Comment notes that "membership in the academic profession carries with it special responsibilities," and refers to the AAUP's Statement on Professional Ethics.³
 - b. The Statement of Professional Ethics emphasizes, among other things, that:
 - (1) "Professors demonstrate respect for students as individuals and adhere to their proper roles as intellectual guides and counselors."
 - (2) "Professors make every reasonable effort to . . . ensure that their evaluations of students reflect each student's true merit."
 - (3) "They avoid any exploitation, harassment, or discriminatory treatment of students."
 - (4) "Professors do not discriminate against or harass colleagues."
 - (5) "They respect and defend the free inquiry of associates, even when it leads to findings and conclusions that differ from their own."

D. Legal Status of Academic Freedom

1. "Academic Freedom" is institution-specific and contractual in nature.
2. Some institutions have broader and more comprehensive definitions of academic freedom than others. For example, some adopt the AAUP Statement of Principles,

³ See <http://www.aaup.org/AAUP/pubsres/policydocs/contents/statementonprofessionalethics.htm>.

in whole or in part, while others rely on other sources (e.g., in MSU's case, "American Association of State Colleges and Universities, adopted November 9, 1971").

3. Some (primarily private) institutions accord their faculty far less (or virtually no) academic freedom.

III. Constitutional Law Issues: The First Amendment does not Protect Academic Freedom of Faculty

A. *Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir. 2000)

It is well settled that citizens do not relinquish all of their First Amendment rights by virtue of accepting public employment. See *United States v. National Treasury Employees Union*, 513 U.S. 454, 465 (1995) [hereinafter NTEU]; *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). Nevertheless, the state, as an employer, undoubtedly possesses greater authority to restrict the speech of its employees than it has as sovereign to restrict the speech of the citizenry as a whole. See *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion) (recognizing that "the government as employer . . . has far broader powers than does the government as sovereign"); *Pickering*, 391 U.S. at 568 (explaining that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general"). **A determination of whether a restriction imposed on a public employee's speech violates the First Amendment requires "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."** *Connick*, 461 U.S. at 142 (alteration in original) (quoting *Pickering*, 391 U.S. at 568). **This balancing involves an inquiry first into whether the speech at issue was that of a private citizen speaking on a matter of public concern. If so, the court must next consider whether the employee's interest in First Amendment expression outweighs the public employer's interest in what the employer has determined to be the appropriate operation of the workplace.** See *Pickering*, 391 U.S. at 568.⁴

B. *Rosenberger v. University of Virginia*, 515 U.S. 819, 834 (1995) (A state university may, consistent with the First Amendment, restrict what a professor may teach in the classroom):

⁴ A public employer may fire an employee even "for speaking on a matter of public concern if: (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech." *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995) (citing *Waters v. Churchill*, 511 U.S. 661 (1994)). See also *DiMeglio v. Haines*, 45 F.3d 790, 805-806 (4th Cir. 1995) ("[e]ven if [plaintiff] was speaking as a private citizen and on a matter of public concern, . . . it is still not clear that his speech would have been protected, since the interests of the State in preventing disruption of the orderly management of its offices might well have outweighed [his] interests in expressing himself on the subject and in the manner, time, and place that he did").

When the State is the speaker, it may make content-based choices. **When the University determines the content of the education it provides, it is the University speaking**, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. . . .

- C. *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 593 (6th Cir 2005) (Sixth Circuit endorses the concept that individual professors do not have a First Amendment right to "academic freedom"):

"To the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors." *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (describing the **"four essential freedoms of a university"**: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."). "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *see also Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989) ("The administration of the university rests not with the courts, but with the administrators of the institution.").

Johnson-Kurek v. Abu-Absi, 423 F.3d 590, 593 (6th Cir. 2005), *cert. denied* 2006.

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While the First Amendment may protect [a professor's] right to express her ideas about pedagogy, it does not require that the university permit her to teach her classes in accordance with those ideas. The freedom of a university to decide what may be taught and how it shall be taught would be meaningless if a professor were entitled to refuse to comply with university requirements whenever they conflict with his or her teaching philosophy.

Id., 423 F.3d at 595.

- D. *Hetrick v. Martin*, 480 F.2d 705, 709 (6th Cir. 1973), *cert. denied*, 414 U.S. 1075 (1973):

We do not accept plaintiff's assertion that the school administration abridged her First Amendment rights when it refused to rehire her because it considered her teaching philosophy to be incompatible with the pedagogical aims of the University. Whatever may be the ultimate scope of the amorphous "academic freedom" guaranteed to our Nation's teachers and students, . . . it does not encompass the right of a nontenured teacher to have her teaching style insulated from review by her superiors when they determine whether she has merited tenured status just because her methods and philosophy are considered acceptable somewhere within the teaching profession.

- E. Other forms of constitutionally unprotected speech include unlawful harassment, obscenity, defamation, and fighting words, all of which the Supreme Court has held constitute "constitutionally proscribable content." *See, e.g., R. A. V. v. City of St. Paul*, 505 U.S. 377, 382-86, 390-92 (1992).

IV. Morehead State University Policies (separate handouts)

- A. Morehead State University – Policies Related to Academic Freedom
- B. PAc-14 (Academic Freedom and Responsibility) – Annotated
- C. PAc-12 (Professional Ethics Policy) – Annotated

V. Academic Freedom issues at Morehead State University

- A. General Education Reform
- B. HB 158 (separate handout)
- C. Other?

VI. Conclusion/Questions